SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 232

ANDREW KJAR, ALIAS PETER ORLOFF,
Petitioner,

versus

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

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No. 232

ANDREW KJAR, ALIAS PETER ORLOFF,
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versus

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Andrew Kjar, alias Peter Orloff, for a writ of certiorari to review a judgment of the Court of Claims respectfully shows:

Statement of the Case

The Commissioner of Internal Revenue made jeopardy assessments against the petitioner for income tax deficiencies and penalties for the years 1928, 1929, 1930, 1931 and 1932, and his properties were seized and sold, and in addi-

tion thereto the Commissioner also made and asserted joint assessments for distilled spirits tax (importations and diversions 108,463 gallons) against petitioner Kjar and six other individuals, all alleged to have been involved in the same years (1928, 1929, 1930, 1931 and 1932) and in the same transactions.

Petitioner Kjar in propria persona, took an appeal to the Board of Tax Appeals (now the Tax Court), hereinafter referred to as the Board, and conducted and tried his case before it. In order for the Board to determine the income tax liability of Kjar it became necessary for the Board to determine if Kjar was involved in the asserted importations with the six other individuals and to what extent in order that the amount of his sales from importations could be ascertained and his income therefrom determined.

The Board determined during the year 1928 that Kjar had imported 2566 cases (approximately 7143 gallons) of liquor and during 1930 he had imported 750 cases (approximately 2250 gallons) and the Board also determined that during the years 1929, 1931 and 1932 Kjar had not been engaged in the purchase and sale of liquors and traced his activities and income to other sources and in its opinion said:

> "This being a fraud case, the respondent has the burden of coming forward with proof of the fraud; but, inasmuch as there is no question of the assessments being barred by the statute of limitations, the taxpayers have the burden of coming forward with evidence to disprove the correctness of the deficiencies which have been determined by the respondent, and which are entitled to a presumption of correctness. L. Schepp Co., 25 B. T. A. 419; Leonard B. Willitts, 36 B. T. A. 294; Avery *v.* Commissioner, 22 Fed. (2d) 6. Petitioner having assumed his burden of coming forward with proof as to all years in question, and respondent having met this proof with witnesses and exhibits of his own, we are faced with the problem

of deciding many questions of fact from the weight of the evidence.

"The material facts which we have concluded are correct are set forth in our findings, supra . . ."

Petitioner, in propria persona, sued the United States in the Court of Claims (No. 46067) to recover damage sustained by the sale of his property for a price less than its true value and to recover an overpayment brought about by the subsequent reduction of income tax assessments by the Board.

The respondent conuterclaimed for its alleged distilled spirit taxes for the years 1928, 1929, 1930, 1931 and 1932.

The petition was dismissed and judgment was entered for respondent on its counterclaim, for $100,685.11.

The Court of Claims denied a motion for a new trial and entered judgment for respondent in the sum of $106,685.11.

The relief prayed for is that the judgment in the sum of $106,685.11 be reduced to the sum of $306.71.

The Court of Claims found:

"As to Andrew Kjar, the Board determined (opinion entered September 30, 1941) that during the year 1928 he had imported 2,566 cases of liquor of which he sold 2,381 cases, and during 1930 he had imported and sold 750 cases. The Board also found that during the years 1929, 1931 and 1932, Kjar had not been engaged in the purchase and sale of liquor. A recomputation on February 17, 1942, under the Board's decision of the deficiencies as determined by the Commissioner, resulted in the determination that Kjar had no income tax liability for the years 1929, 1931, and 1932, and that he had overpaid his income taxes for the years before the Board in the total amount of $16,025.59."

The Court of Claims in its opinion said:

"We are not unmindful of the fact that the Board of Tax Appeals found that during the year 1928 Kjar had imported only 2,566 cases of liquor (approximately

7,143 gallons), whereas the assessment of the commissioner of Internal Revenue is based upon the importation of 16,800 gallons from June 1928 to January 1929. It is also true that the Board found that Kjar imported during the year 1930, 750 cases (approximately 2,250 gallons), and that for the years 1929, 1931 and 1932 he had not realized sufficient income to subject him to income tax liability for those years; whereas the Commissioner of Internal Revenue found that during the years 1929 to 1932 he had imported 92,153 gallons."

"However, we do not think that in this proceeding the Government is estopped by the judgment of the Board of Tax Appeals. The issue before the Board was the income realized by the taxpayers in these years. This was determined by it upon the basis of the amount of liquor sold by them and the cost to them of the liquor sold. However, the distilled spirits tax levied by section 900 of the Revenue Act of 1926 was levied on distilled spirits then in bond "or that have been or that may be hereafter produced in or imported into the United States." Liquor could be produced in or imported into the United States without subjecting the producer or the importer to income tax liability and, therefore, the amount of liquor imported or produced by the taxpayer was not at issue in the proceeding before the Board. In a subsequent proceeding between the same parties on a different cause of action they are estopped to dispute only those facts determined in a previous proceeding which were material to the determination of the issues presented therein. Cromwell *v.* County of Sec. 94 U. S. 351; Southern Pacific Railroad Co. *v.* United States, 168 U. S. 1; Tait *v.* Western Maryland Railway Co., 289 U. S. 620. Since in the issue before the Board of Tax Appeals it was not necessary for that Board to determine the amount of liquor produced or imported in the years in question, its finding on that fact does not estop the parties in this proceeding."

"Moreover, we do not think that this finding of the Board of Tax Appeals overcomes the presumptive cor-

rectness of the finding of the Commissioner of Internal Revenue, for the same reason. Since it was not necessary for the Board to determine the amount of liquor produced or imported by the taxpayer, it is not to be presumed that the Board gave careful consideration to a determination of this fact, and for this reason we cannot say that its determination of this fact is sufficient to overcome the presumptive correctness of the determination of the Commissioner of Internal Revenue, who was compelled to make a determination of this fact as accurately as possible in order to correctly assess these taxes."

Questions Presented

First Question: Respondent having litigated the issue of quantity of distilled spirits imported and sold with petitioner in the Board of Tax Appeals, to determine petitioner's income, was respondent estopped by the findings and judgment of the Board to relitigate the same issue (quantity of distilled spirits imported) in the subsequent proceedings in the Court of Claims?

Second Question: Did the finding of fact, by the Board of Tax Appeals, that Petitioner imported and sold 7,143 gallons of distilled spirits in 1928 and 2,250 gallons of distilled spirits in 1930 and none in 1929, 1931 and 1932 overcome the presumptive correctness of the finding of the Commissioner of Internal Revenue that petitioner imported 108,463 gallons during the same period?

Reasons Relied Upon for the Allowance of the Writ

The Court of Claims erroneously failed to give effect to the Federal rule of estoppel by judgment, and refused to give effect to the decision and judgment of the Board, of the material issue of fact (quantity of importations) litigated, decided and determined by the Board, contrary to

and in conflict with applicable decisions of this Court, viz:

> "Cromwell *v.* County of Sac, 94 U. S. 351; Southern Pacific Railroad Co. *v.* United States, 168 U. S. 1; Tait *v.* Western Maryland Railway Co., 289 U. S. 620."

The Court of Claims also erroneously decided that it was not necessary for the Board to determine questions of fact, which the Board had determined and decided, and erroneously decided that "it is not to be presumed that the Board gave careful consideration to a determination" of the fact (quantity of importation), and for that reason held the decision of the Board was not sufficient to overcome the presumptive correctiveness of the determination of the Commissioner of Internal Revenue.

The petitioner prays that a writ of Certiorari issue to require the Court of Claims to certify to this Court for a review and determination of the errors assigned, and to review the said judgment of the Court of Claims.

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Attorney for Petitioner.

BRIEF OF PETITIONER

The decisions of the Court of Claims have not been reported and are included in transcript of record (R. 14 & 33). The decision of the Board of Tax Appeals (now Tax Court of the United States) has not been reported, and is included as an appendix to this brief (p. 18).

Grounds on Which Jurisdiction of This Court Is Invoked

The jurisdiction of this court is invoked by virtue of 28 U. S. C. A. Section 288, C. 140 53 Stat. 752 for the reason that the Court of Claims has not given proper effect to applicable decision of this court, and has decided a Federal question in conflict with the applicable decisions of this court.

Statement of the Case

The Commissioner of Internal Revenue made jeopardy assessments against the petitioner for income tax deficiencies and penalties for the years 1928, 1929, 1930, 1931 and 1932, and his properties were seized and sold. In addition thereto the Commissioner also made and asserted joint assessments for distilled spirits tax (importations and diversions 108,463 gallons at $1.10 per gallon under Sec. 900 Revenue Act 1926) against petitioner Kjar, and six other individuals, all alleged to have been involved in the same years, (1928, 1929, 1930, 1931 and 1932) and in the same transactions.

Petitioner Kjar in *propria persona*, took an appeal to the Board of Tax Appeals, (now the Tax Court) hereinafter referred to as the Board, and conducted and tried his case before it. In order for the Board to determine the income tax liability of Kjar it became necessary for the Board to determine, if Kjar was involved in the asserted importations with the six other individuals and to what

extent in order that the amount of his sales from importations could be ascertained and his income therefrom determined.

The Board in its opinion said (Appendix to Brief P. 29):

> "This being a fraud case, the respondent has the burden of coming forward with proof of the fraud; but, inasmuch as there is no question of the assessments being barred by the statute of limitations, the taxpayers have the burden of coming forward with evidence to disprove the correctness of the deficiencies which have been determined by the respondent, and which are entitled to a presumption of correctness. L. Schepp Co., 25 B. T. A. 419; Leonard B. Willits, 36 B. T. A. 294; Avery v. Commissioner, 22 Fed. (2d) 6. Petitioner having assumed his burden of coming forward with proof as to all years in question, and respondent having met this proof with witnesses and exhibits of his own, we are faced with the problem of deciding many questions of fact from the weight of the evidence.
>
> The material facts which we have concluded are correct are set forth in our findings, supra . . ."

and determined that during the year 1928 Kjar had imported 2566 cases (approximately 7143 gallons) of liquor and during 1930 he had imported 750 cases (approximately 2250 gallons) and that during the years 1929, 1931 and 1932 Kjar had not been engaged in the purchase and sale of liquors and traced his activities and income to other sources (R. 17 Appendix to Brief pp. 21-24).

Petitioner in *propria persona* sued the United States in the Court of Claims to recover damages sustained by the sale of his property for a price less than its true value, and to recover an overpayment brought about by the subsequent reduction of income tax assessments by the Board (R. 1). The United States counter claimed for distilled spirits taxes

on 108,463 gallons of distilled spirits alleged to have been imported during the years 1928, 1929, 1930, 1931 and 1932 (R. 4, 7, 9). Petitioner's petition was dismissed and no question is presented here with respect to the dismissal of the petition.

The principal question involved is the application of the Federal (General) rule of estoppel by judgment and the relief sought is the reduction of the judgment entered against petitioner on respondent's counter claim in the sum of $106,685.11 to the sum of $306.71.

The judgment rendered was for distilled spirits taxes for the years 1928, 1929, 1930, 1931 and 1932 under Section 900 of the Revenue Act of 1926, providing for the levy and collection on distilled spirits in bond or produced or imported into the United States on or after January 1, 1928, a tax at the rate of $1.10 per proof gallon or wine gallon (R. 32).

The calculation by the Court of Claims was determined as follows:

Total tax assessed against Kjar and six others (R. 16)	$119,309.30
A credit, $2,598.60 was allowed by reason of a compromise payment made by Mrs. H. L. Thompson (one of the six) (R. 16)	2,598.60
Balance	$116,710.70
A credit, $16,025.59 was allowed because of payment of income taxes by Kjar and wife (R. 29)	16,025.59
First Judgment against Kjar (R. 32)	$100,685.11
The motion for a new trial by Mrs. Kjar was granted and judgment was entered in her favor for $6,000.00 (R. 35) and this sum was added to the first judgment against Kjar (R. 36)	6,000.00
Final judgment against Kjar (R. 36)	$106,685.11

No questions were presented to the Court of Claims that the distilled spirits were in bond, or had been produced in the United States. The only question was that of importation. The point in question before the Board was the quantity of importations by Kjar and when that question was determined by it, then the amount of income upon which deficiencies and penalties were ascertained was determined by the Board. The Commissioner of the Court of Claims found "only that 'substantial quantities' of whiskey were imported by Kjar in 1928 and 1930 (R. 14 and 30)."

Notwithstanding the affirmative finding of the Board on the point and the question litigated and determined, that is that Kjar imported 9,393 gallons in 1928 and 1930, and that he had not been engaged in the illegal operations during the years 1929, 1931 and 1932, and notwithstanding the finding of the Commissioner of the Court of Claims that only substantial quantities of whiskey were imported in 1928 and 1930 by Kjar, the Court of Claims decided that the United States was not estopped by the judgment of the Board.

ARGUMENT

Point One

The General Rule of Estoppel by Judgment Is Applicable to This Suit

The Petitioner relies on the following decisions of this Court defining the Federal (General) rule of estoppel by judgment;

Cromwell v. *County of Sac*, 94 U. S. 351;
Southern Pacific Railroad Co. v. *U. S.*, 168 U. S. 1;
Tait v. *Western Maryland Railway Co.*, 289 U. S. 620.

In the *Tait* case the Court said:

"1. The scope of the estoppel of a judgment depends upon whether the question arises in a subse-

quent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. Cromwell *v.* Sac County, 94 U. S. 351-353, 24 L. ed. 195-198; Southern P. R. Co. *v.* United States, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 S. Ct. 18; United States *v.* Moser, 266 U. S. 236, 241, 69 L. ed. 262, 264, 45 S. Ct. 66." Text 623,

and

"As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.

This court has repeatedly applied the doctrine of res judicata in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. New Orleans *v.* Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 S. Ct. 905; Third Nat. Bank *v.* Stone, 174 U. S. 432, 43 L. ed. 1035, 19 S. Ct. 759; Baldwin *v.* Maryland, 179 U. S. 220, 45 L. ed. 160, 21 S. Ct. 105; Deposit Bank *v.* Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 S. Ct. 154, Compare United States *v.* Stone & D. Co., 274 U. S. 225, 230, 231, 71 L. ed. 1013, 1024, 1025, 47 S. Ct. 616. The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens." Text 624,

and

. . . "The petitioner may not escape the effect of the earlier judgment as an estoppel by showing an

> inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment. Compare Deposit Bank *v.* Frankfort, 191 U. S. 499, 510, 511, 48 L. ed. 276, 280, 281, 24 S. Ct. 154. The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding." Text 626.

and

> "We think however, that where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment. See Second Nat. Bank *v.* Woodworth (D. C.), 54 F. (2d) 672; Bertelsen *v.* White (D. C.), 58 F. (2d) 792." Text 627.

The distilled spirits assessments relied upon by the United States in the Court of Claims were the identical assessments asserted by the Commissioner before the Board (R. 16 and Appendix to Brief p. 30).

(Explanatory Note: The assessment (R. 16) for the year 1928, date of list February, 1935, is in the amount of $18,480.00, and includes the name of Mrs. H. L. Thompson. The assessment (Appendix to Brief p. 25) for the year 1928 is in the sum of $15,881.40 and does not include the name of Mrs. Thompson. The difference in amounts is merely the result of the reduction of the original assessment by $2598.60, the sum received from Mrs. Thompson in compromise of her liability.)

The Board found and determined that Petitioner Kjar imported lesser amounts in 1928 and 1930 (fixing the amounts) than the assessments asserted. And notwithstanding the fact that the assessments asserted that petitioner had been engaged in the importation and diversion

of distilled spirits in 1929, 1931 and 1932, the Board found that during those years petitioner had not been engaged in the practice of importation and diversion of distilled spirits at all (R. 30), and Appendix to Brief, pp. 21-24).

In the *Southern Pacific* case the United States relied upon certain maps, which had been in issue between the same parties in an earlier case. The Supreme Court said, Text 48, that the maps:

> "Are identical maps which the government relied on the former cases . . . and which were adjudged . . . to be valid."

The Court further said, Text 48 and 49:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order: for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The rule of estoppel by judgment with respect to rights, questions, or facts actually litigated in the former case was applied. In the present case the transactions (importation

of liquor, years of importation and quantities) are the identical transactions which the Government relied on in the former case (Board of Tax Appeals) and which were adjudged by the Board.

In *Cromwell* v. *Sac County, Supra,* Text 353, the Court said:

> "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action;"

The rule of estoppel by judgment with respect to rights, questions, or facts actually determined in the former case (Board of Tax Appeals) should be applied.

POINT TWO

The Court of Claims Has No Appellate or Supervisory Control Over the Final Judgment of the Board of Tax Appeals.

The Court of Claims decided that it was not necessary for the Board to determine the amount of liquor imported in the years in question and that it was not to be presumed that the Board gave careful consideration to a determination of the quantity (importation) in which Kjar was involved with the six others. It therefore, concluded that the determination and finding of such fact by the Board was not sufficient to overcome the presumptive correctness of the determination of the Commissioner of Internal Revenue (R. 31), notwithstanding the record fact that the Board in its opinion said the material facts which it had concluded were correct (Appendix to Brief, p. 29) and determined the quantity of importations and the years thereof, as well as the years in which Kjar had not engaged in importations.

The exclusive jurisdiction to review the decisions of the Board of Tax Appeals is conferred on the Circuit Court of Appeals and the United States Circuit Court of Appeals for the District of Columbia, 43 Stat. 938, 28 U. S. C. A. Sec. 347.

In the application of the rule of estoppel by judgment, courts having no appellate jurisdiction have no lawful authority to inquire into the "necessity" of another Court's findings and determinations. This conclusion by the Court of Claims is in conflict with the Cited cases.

Conclusion

The identical distilled spirits tax assessments were at issue first before the Board and thereafter before the Court of Claims. The amount of tax, the gallonage, the parties involved, the date of assessment and the years involved were the same. The petitioner assumed his burden of proof with respect to the importation for each year in question and the Board made specific findings of fact. These findings of fact under the Tate, Cromwell and Southern Pacific cases have the weight and effect of a judgment.

Having once distinctly put this question in issue before the Board of Tax Appeals, the United States can not in a subsequent proceeding, although on a different cause of action, relitigate the same issue. It was estopped by the specific finding of fact of the Board and the rule of estoppel by judgment should be applied and the judgment of the United States on its counter claim limited to the sum of $306.71.

Respectfully submitted,

HENRY H. TAYLOR, JR.,
715 Ingraham Building,
Miami (32), Florida,
Attorney for Petitioner.

APPENDIX

THE TAX COURT OF THE UNITED STATES, WASHINGTON

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Victor S. Mersch, Clerk of The Tax Court of the United States, hereby certify the attached to be a true and correct copy of the MEMORANDUM FINDINGS OF FACT AND OPINION in Docket Numbers 99587, 99588, 104089 and 99591, wherein Andrew Kjar, Ester Harley Sharon, Andrew Kjar and Mary M. Sanchez, are the petitioners and the Commissioner of Internal Revenue is the Respondent.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court at the City of Washington in said District this 24th day of July, 1947.

VICTOR S. MERSCH,
[SEAL.] *Clerk, The Tax Court of the United States.*

THE TAX COURT OF THE UNITED STATES, WASHINGTON

Docket Nos. 99587, 99588, 10489 & 99591

ANDREW KJAR et al., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

I, Bolon B. Turner, Presiding Judge of The Tax Court of the United States, the same being an independent agency in the executive branch of the Government, do hereby certify that Victor S. Mersch is clerk of said Court and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 24th day of July, 1947.

BOLON B. TURNER,
[SEAL.] *Presiding Judge.*

THE TAX COURT OF THE UNITED STATES,
WASHINGTON

Docket Nos. 99587, 99588, 104089 & 99591

ANDREW KJAR, et al., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that Bolon B. Turner, whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Presiding Judge of The Tax Court of the United States, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, D. C., this 24th day of July, 1947.

VICTOR S. MERSCH,

[SEAL.] *Clerk, The Tax Court of the United States.*

ANDREW KJAR, alias Andrew Kar, alias Peter Orloff, and Katherine D. Kjar, Husband and Wife, jointly and severally, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ESTER HARLEY SHARON, as Transferee of the assets of Andrew Kjar, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ANDREW KJAR, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MARY M. SANCHEZ, as Transferee of the Assets of Andrew Kjar, etc., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 99587, 99588, 104089, 99591

Copies served on both parties.
Andrew Kjar, pro se.
F. L. Van Haaften, Esq., for the respondent.

Memorandum Findings of Fact and Opinion

In these proceedings, consolidated for hearing and decision, the respondent has determined income tax deficiencies and penalties due thereon against Andrew Kjar and Katherine D. Kjar, as follows:

Docket No. 99587

Year	*Deficiency*	*25% Penalty*	*50% Penalty*
1928	$18,171.87	$4,542.97	$ 9,085.94
1929	21,397.23	5,349.31	10,698.62
1930	17,596.85	4,399.21	8,798.43

In addition respondent has determined income tax deficiencies and penalties due thereon against Andrew Kjar, as follows:

[redacted]cket No. 104089

Year	*Deficiency*	*25% Penalty*	*50% Penalty*
1931	$26,415.94	$6,603.99	$13,207.97
1932	1,123.90	280.98	561.95

Docket No. 99588 involves the assertion of transferee liability against Ester Harley Sharon, as follows:

Year	*Liability*	*25% Penalty*	*50% Penalty*
1928	$18,171.87	$4,542.97	$ 9,085.94
1929	21,397.23	5,349.31	10,698.62
1930	17,596.85	4,399.21	8,798.43

Docket No. 99591 involves transferee liability against Mary M. Sanchez, as follows:

Year	*Liability*	*25% Penalty*	*50% Penalty*
1928	$18,171.87	$4,542.97	$ 9,085.94
1929	21,397.23	5,349.31	10,698.62
1930	17,596.85	4,399.21	8,798.43

The questions herein presented for our determination are as follows:

1. Whether the Commissioner erred in computing the income of Andrew Kjar and Katherine D. Kjar for any of the years 1928, 1929, 1930, 1931 or 1932;

2. If the Commissioner's determination is sustained as to any of the years involved, whether any part of the deficiency for those years was due to fraud with intent to evade tax;

3. Whether Andrew Kjar and Katherine D. Kjar are liable for the 25 per cent penalty for delinquency in the filing of returns; and

4. Whether the Commissioner erred in holding Ester Harley Sharon and Mary M. Sanchez, liable for the years 1928, 1929 and 1930 as transferees of the assets of Andrew Kjar and Katherine D. Kjar.

Findings of Fact

Petitioner, Andrew Kjar, alias Peter Orloff, alias Andrew Kar, was born in Denmark. In his early life he was a sailor. He first came to this country in 1895 from China and sailed out of the port of New York. In 1918, or there abouts, he went to Florida where he remained at St. Augustine for five or six years in the shipping business. There he owned and operated two shrimp boats. At about that time he became a naturalized citizen of the United States. He came to Savannah, Georgia, around 1924. At that time petitioner had about $35,000 in cash but was no longer the owner of any ships, nor did he hold title to any realty. Petitioner was at all time during the taxable years married to Katherine Kjar, alias Katherine Orloff.

Earlier in 1921, while still in St. Augustine, petitioner had becomme engaged in the illegal practice of bringing intoxicating liquors into this country for resale here. In 1928 in Savannah he continued this activity. His method of business was to send a ship captain to Nassau, Bermuda, or West End Bahamas, with order to buy certain liquors. The captain would then bring the vessel back to Savannah and charge petitioner $5.00 per case for the trip. Unloading and landing were also paid for, charge for the former being about $1. per case and generally a nominal charge for the latter. The liquor was then transported to storage and stored somewhere at an added charge of approximately $2. per case. Customers bought this liquor wholesale in lots averaging from 20 to 25 cases a load. Petitioner hired men to transfer the liquor from its place of storage to automobiles provided by the customers. The charge for this last job amounted to approximately 50 cents a case.

Usually the boatloads were split three ways when they arrived at Savannah. A man named Jenkins had an interest in one-third of the cargo and Richard Bailey had an interest in the remaining third. Most of the cargoes were made up of gin and rye, bourbon and scotch whiskeys. Occasionally there were orders for small amounts of champagne, bourbon whiskey, brandies, wines and novelty bottles of scotch whiskey, but in the main the greatest traffic was in rye and the petitioner's interest was, for all practical purposes, in only the gin, rye and scotch. The cost per case of these liquors on the islands was substantially as follows:

Rye	$17.50
Scotch	16.50
Gin	11.75

The ratio of rye purchased by petitioner to gin and scotch was 10 to 1.

There was always a slight variance in prices according to whether the case contained pint or quart bottles, the former being anywhere from 50 cents to $1 more expensive.

Although some persons sold scotch and rye at prices rang-

ing from $40 to $45 in Savannah, petitioner sold his share of the cargoes in 1928 in Savannah and vicinity for the following prices per case:

Rye	$35.00–$37.50
Scotch	32.50–35.00
Gin	27.50–

(the top figure represents pint sizes).

While the evidence is not as clear as we might desire as to the number of cases the ships would carry each load, we conclude that the average was 700 cases. During the year 1928 petitioner's liquor was carried on the "Mary" of which George Kjar, a brother of petitioner, was the captain. Petitioner had a one-third interest in 11 such cargoes, and therefore, had an interest in 2,566 cases of liquor. Most of this liquor was rye and a small amount of scotch and gin. The cost of these 2,566 cases of liquor in 1928 to petitioner was $43,622, not including the charges for freight, unloading and loading, landing and storage. Forty-four cases of this were confiscated before resale and 741 more cases were hijacked before resale, though 600 of these were recovered by making payments to the thieves. The remaining 2,381 cases of liquor petitioner sold, receiving in exchange therefor approximately $83,600 in 1928. The cost of these 2,381 cases was $40,477 plus charges for freight, landing and unloading amounting to an additional $14,386. In addition, petitioner paid certain charges for storage and loading the liquor into customers' cars, but, as we shall point out in our opinion, we consider these figures to be immaterial.

There were other incidental expenditures made by the petitioner in 1928 such as the forfeit of $500 bail petitioner put up for one of his men who left town, $300 more to get this man out of town and away from jeopardy and $300 in connection with the seizure of 22 cases of rye, but we consider these expenditures immaterial, also.

In addition to his income from the sale of liquor, peti-

tioner received $400 house rent in 1928. Kjar's taxable income for 1928 was $29,137, calculated as follows:

Proceeds from sale of liquor	$83,600
Less cost of liquor plus deductible expenditures	54,863
	$28,737
Plus house rent	400
	$29,137

In the following year petitioner, Andrew Kjar, did no liquor business in or around Savannah. He worked with W. A. Stubbs on a house and in the fall of the year left town. He went to Florence, South Carolina, where he met the Bookhoop family who were storing liquor there for R. A. Bailey. Bailey had moved his business there from Savannah in the early part of the year. Andrew Kjar had a son-in-law, Edgar Sanchez, who had worked for him in the liquor trade in 1928. In 1929, when Kjar went to South Carolina, Sanchez also went to South Carolina. While liquor operations were carried on at Florence, Andrew Kjar's brother, George, did not bring in anything to Florence on his boat. In the prior year the Kjars and Sanchez had been considered as working togther in their transactions. Actually George Kjar ran the boat and had an interest in all the freight charges, while Sanchez merely worked for Andrew Kjar, much in the capacity of an agent. Andrew Kjar had never told anyone to treat Sanchez as his agent but it seems to have been the practice to treat him as such whenever either Bailey or the Jenkins brothers had money or other transactions with Andrew Kjar or George Kjar.

In 1929 Andrew Kjar sold no liquor to customers. He came in on a boat from Bermuda, the "Dorothy", in 1929 or early 1930, which carried liquor for Bailey, at Bermuda prices plus freight, which was paid to the captain of the vessel. It is not clear whether or not Andrew Kjar had an interest in another load in 1929 which was confiscated; but, in any event, this was never recovered or sold by

Kjar. Neither of the Jenkins brothers, who were importing liquor there, believed that Kjar was doing any business in 1929; and, while Kjar was once picked up by the authorities on suspicion during the year, he was released.

In March of 1930 Andrew Kjar left the United States and went to Canada, where he supervised the building of a vessel, "The Tanner". Edgar Sanchez stayed behind and engaged in the illegal liquor trade on his own behalf. No one ever heard Kjar say that Sanchez was running the business as his representative in his absence. Kjar had ceased operations and any liquor brought in by Sanchez in Kjar's absence was entirely Sanchez's. Kjar returned to the United States in the fall of the year and to some extent continued his former activities. He had a one-third interest in a ship from the North which was confiscated with approximately 800 cases aboard and his share was entirely lost. The three parties interested in this venture had given a bond in the amount of $3,700 to the owner of the vessel as insurance against the loss of the vessel. When the vessel was confiscated, this bond was forfeited. Kjar's one-third contribution in this connection was $1,233.33. At another time Kjar brought in 300 cases of liquor (cost $14.50 per case), which was later sold at approximately $32 per case, but half of this belonged to Edgar Sanchez. Kjar did no business in Savannah in 1930; what sales he made were in South Carolina. In addition to the two ventures mentioned above, Kjar had part interest in three more cargoes, his interest amounting to 600 additional cases, which places his sales in 1930 at 750 cases purchased at $14.50 and sold at $32 per case. Freight charges were still $5 per case; but the unloading charge was only 50 cents per case. Kjar's income for 1930 subject to taxation was $9,000.

In 1931 Kjar was in California most of the year. He made one trip to New Jersey but at no time during the year did he sell any intoxicating liquors. His sole income consisted of $3,000 which he had earned in 1930 but did not receive until 1931. The source of this income is not clear. Although transactions were still being carried on in South Carolina in 1931, Kjar had no agent there working

for him. Edgar Sanchez, if he was engaging in the purchase and sale of liquors, was representing himself.

In 1932 Kjar made $1,400 commission on the sale of a ship in California, where he stayed during almost the entire year. That year Kjar and his wife purchased some stock and his wife, Katherine, received $1,800 in dividends. She filed an individual Federal income tax return under the name of Katherine Orloff reporting this income. Andrew Kjar received no income from any stocks, however, nor was he engaged in the purchase and sale of liquor in 1932. In addition to the purchase of certain stocks in California in 1932, other purchases were made in New Orleans. The California brokerage account was in Katherine's name and Kjar operated it under a power of attorney. Some of her stock was also bought through an account of Edgar Sanchez and delivered to her; in particular, 500 shares of General Motors. The Kjars paid for this purchase. In May 1933, the Kjars had a $49,476.44 account with brokers in New York but by then they had sold nearly all of the securities purchased in California and New Orleans. In the years from 1932 to 1938 the wealth of Andrew Kjar increased approximately seventy-five thousand dollars from holdings and transactions in Miami real estate and stocks.

In January 1935 Andrew Kjar, as Peter Orloff, purchased four lots better described as lots 7 and 8, block 2, San Marino; lot 8, block 7, San Marco; and lot 6, block 7 San Marco; all in Dade County, Florida. The purchase price was $2,700, plus back taxes payable on the properties. Kjar built a sea wall on this property at the cost of $1,400. In August 1937, Kjar and his wife, under the names of Peter and Katherine D. Orloff, transferred these four lots to Esther Sharon (one of the petitioners herein), by warranty deed. The purchase price, as stated on each deed, was "ten dollars and other good and valuable considerations." Actually Ester Sharon, who is one of their children, gave Kjar in exchange a note in the sum of $5,000 acknowledging receipt of the lots and admitting an indebtedness of $5,000 therefor which was to be payable only upon resale or transfer of the lots by Ester Sharon. Acknowledgment was made on the reverse side of the note of two payments of $100 each in 1938.

Upon sale of these lots for any greater amount than $5,000, Ester Sharon was to keep the difference between the sales price and $5,000. These lots are still held by her. The transfer was made without adequate consideration.

In May 1937, J. H. Hearne, the owner of record of a certain tract of land known as the Winn Plantation in Liberty County, Georgia, entered into a deed conveying an undivided one-half interest in that property to Ester Sharon and Mary Sanchez. This deed was recorded by the Clerk of the Superior Court of Liberty County on May 29, 1937. Ester Sharon knew nothing whatsoever about this until after the date of the transaction and has never paid any money to J. H. Hearne for the property, nor has Mary Sanchez ever paid anything so far as the record discloses. There is no evidence to the effect that Hearne was paid anything for this property by Kjar or anyone else. As to this property Ester Sharon is not a transferee of the assets of Andrew Kjar. There were no other transfers of property from Kjar to Ester Sharon.

In addition to the asserted deficiency in income taxes for the years 1928 through 1932, the following assessments for the importation and diversion of distilled spirits have been made against Andrew Kjar:

Against	*Amount*	*Period*	
Andrew Kjar) Edgar Sanchez))	$23,067.00 (unpaid)	7/20/29	through 12/31/29
Richard Bailey) Chesley Tuten) Wilson Jenkins) Andrew Kjar) George Kjar))	15,881.40 (unpaid)	6/ 1/28	through 12/31/28
Andrew Kjar) Edgar Sanchez))	36,712.50 (unpaid)	9/ 1/30	through 12/31/31
Andrew Kjar) Edgar Sanchez) Chesley Tuten) Richard Bailey) C. Bert Maxwell)	41,049.80 (unpaid)	8/12/29	through 12/31/32

During all the years Andrew Kjar was in Florida and Georgia, until the calendar year 1934, he filed no tax

returns, except for the year 1925 when a return was filed disclosing a tax liability of $14.10. During this same period no returns were filed by Katherine D. Kjar, with the exception of an individual return for herself for the year 1932 under the name of Katherine Orloff.

An assessment of $3,382.18 was transferred to the Collector for the State of Georgia on March 16, 1939. This was for 1928 Federal income taxes and penalties of Andrew Kjar and Katherine D. Kjar. On March 2, 1940, a credit of $350.92 was applied to that account leaving a balance due of $3,025.26 which was transferred to the Collector for the Second District of New York on March 20, 1940, on which date a $500 balance was retransferred to the Florida collector. On September 13, 1940, a credit of $100 was applied against this last balance, leaving a balance of $400 which was retransferred to the New York collector. In June, 1940, in New York a collection of $2,174.22 was credited against the $2,525.26 then outstanding there, leaving a balance due of $351.04 in the hands of the New York collector. This account was transferred to Georgia in June 1940, and in October 1940, the New York collector transferred the $400 account still outstanding to Georgia. At the time of the hearing in these proceedings there remained outstanding and unpaid in the hands of the Collector for the State of Georgia the amount of $741.04, plus interest.

In regard to the 1929 income taxes plus penalties of Kjar and his wife, the Georgia collector transferred an assessment account in the amount of $48,977.09 to the Florida collector. March 20, 1939, the Florida collector transferred to the Georgia collector from this account a balance of $25,000. On February 9, 1940 a credit of $6,000 was applied to the Florida account of $23,977, leaving an outstanding balance of $17,977.09, which was transferred to New York for collection, and retransferred to Georgia in March 1940, and was still outstanding there at the time of hearing in these proceedings. The $25,000 account which the Florida collector had transferred to the Georgia collector was retransferred to the New York collector October 14, 1940, and is still outstanding there. Total balance outstanding for 1929 at the time of the hearing was $42,977.09, plus interest.

In regard to the 1930 income taxes plus penalties of Kjar and his wife, $9,267.35 was transferred from Georgia to the Florida collector on March 16, 1939, and was retransferred to the New York collector in March of the following year. On May 6, 1940, a collection of $123.22 was posted and on June 3, 1940 a collection of $9,144.13, closing the account. A further collection of $681.65 was made on the same day covering delinquent interest. Respondent, by affirmative averment in his answer to the petition in these proceedings, has now requested that the deficiency and penalties for 1930 be increased by the following amounts:

Year	Deficiency	25% penalty	50% penalty
1930	$13,439.12	$3,359.78	$6,719.56

An assessment account of Ester Sharon as transferee of Kjar and wife for 1928 reveals that the collector in Georgia received the account in the amount of $3,382.18 from the Commissioner, and that that account has not been transferred to any other jurisdiction for collection. The 1929 account reveals a credit of $4,430 on March 9, 1940, by the Florida collector, leaving a balance of $44,547.09 still outstanding in Florida. The 1930 account reveals that the Commissioner certified the account in the amount of $9,267.35 to the Georgia collector in March 1939, and that it is still outstanding there and unpaid.

In 1937 and subsequent years the value of the property owned by Kjar and his wife was less than his asserted liability for distilled spirits taxes and his liability for income taxes and penalties as herein determined.

Originally the docket numbers involved in this proceeding were consolidated with the following:

Docket No.	Parties
99672	Edgar Sanchez and Mrs. Mary M. Sanchez, Husband and Wife (jointly and severally).
99590	Mrs. Mary M. Sanchez, individually and as transferee of the assets of Edgar Sanchez and Mrs. Mary M. Sanchez.
104389	Edgar Sanchez.

The deficiencies involved in those cases were identical to those involved in the present proceedings for the years 1929, 1930, 1931 and 1932. At the time of the hearing in these proceedings negotiations for settlement were being made in those cases which ultimately resulted in stipulations admitting complete liability, and an order rescinding their consolidation with the cases involved herein.

In Docket No. 99591, Mary M. Sanchez admits that she is a transferee of Andrew Kjar and has consented to submit her case on the above findings, and to abide by any liability determined by proceedings under Rule 50, Rules of Practice before the United States Board of Tax Appeals.

A part of the deficiencies of Andrew Kjar for 1928 and 1930 was due to fraud with intent to evade taxes.

Opinion

Kern: As previously stated, the issues before us are: (1) whether Andrew Kjar received taxable income in the years 1928 to 1932, inclusive; (2) whether, if taxable income was received in those years, the failure to report the same was due to fraud; (3) whether either Ester Sharon or Mary M. Sanchez, or both, is liable as transferee of the assets of Andrew and Katherine D. Kjar for taxes representing the years 1928 to 1930, inclusive; and (4) whether Andrew and/or Katherine D. Kjar are liable to a 25% penalty for failure to file returns. We shall consider the issues in this order.

It is well to point out that since no returns have been filed by Andrew Kjar or Katherine D. Kjar for any of the years in question, the statute of limitations as to assessment and collection of a deficiency, if any be found, has not run. The 1932 return filed by Katherine D. Kjar was in the name of Katherine Orloff, *her* maiden name, and is therefore not such a return as would start the running of the statute, since she was married at that time. However, spouses are not jointly and severally liable for a deficiency arising entirely out of the separate income of one of them. *Frank W. Darling,* 34 B. T. A. 1062; *Cole* v. *Commissioner,* 81 Fed. (2d) 485. Therefore Katherine D. Kjar is not liable for any deficiencies determined to arise out of a failure by Andrew Kjar to report income.

This being a fraud case, the respondent has the burden of coming forward with proof of the fraud; but, inasmuch as there is no question of the assessments being barred by the statute of limitations, the taxpayers have the burden of coming forward with evidence to disprove the correctness of the deficiencies which have been determined by the respondent, and which are entitled to a presumption of correctness. *L. Schepp Co.*, 25 B. T. A. 419; *Leonard B. Willitts*, 36 B. T. A. 294; *Avery* v. *Commissioner*, 22 Fed. (2d) 6. Petitioner having assumed his burden of coming forward with proof as to all years in question, and respondent having met this proof with witnesses and exhibits of his own, we are faced with the problem of deciding many questions of fact from the weight of the evidence.

The material facts which we have concluded are correct are set forth in our Findings, *supra*, and we shall not burden this opinion by undue repetition. In the first of the taxable years, 1928, we have concluded, see Findings of Fact, that Andrew Kjar was engaged in the illegal importation and sale of distilled spirits. Kjar freely admits this fact. The government asserts that Kjar realized a net gain in that year of $108,625 from the sale of 2,750 cases of liquor. Kjar claims a net income of $1,975, $1,575 of which was derived from the illegal sale of liquor. From the great mass of oral testimony on this point, we have reached the conclusion that Kjar in 1928 purchased 2,566 cases of liquor for resale, at an approximate cost of $43,622. Of these 2,566 cases, only 2,381 were sold by Kjar in 1928. The sales price of the liquor was $83,600, and its cost was $40,477.

We come now to the question of what portion of the taxpayer's receipts constitute taxable net income. As was said in *James P. McKenna*, 1 B. T. A. 326, it is necessary to clearly define *gross* income because *net* income is *gross* income minus certain prescribed statutory deductions. Net income is gross income only in the event there are no such deductions. The gains, profits and income which constitute gross income are *actual* gains, profits and income. *Walsh* v. *Brewster*, 255 U. S. 536; *United States* v. *Central National Bank*, 10 Fed. 612; *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509; *James P. McKenna, supra.* Therefore, in determining the actual gain resulting to Andrew Kjar

for the year 1928, it would seem that we must view the entire transaction from purchase to sale and include in our calculations of gross income any expenditures essential to the acquisition of the 2,381 cases of liquor. Such expenditures are the freight charges, unloading charges and landing charges, which amount to $14,386. To the $40,477 purchase price of the liquor actually sold this latter sum must be added to arrive at an ultimate cost figure. The ultimate cost to Kjar of the liquor he sold was $54,863. Subtracting this figure from the $83,600 sales price we receive a figure for gross income of $28,737, which must be increased by the $400 rent item to arrive at Kjar's ultimate gross income for 1928. As set forth in our Findings of Fact, *supra*, this amounts to $29,137, on which amount the 1928 tax must be determined. There no longer remains any doubt that income derived from criminal transactions, as by unlawful sale of intoxicating liquor, is taxable. *Sullivan* v. *United States*, 15 Fed. (2d) 809; *Steinberg* v. *United States*, 14 Fed. (2d) 564.

In arriving at our determination of Kjar's taxable income for 1928 it will be noticed that we have made no allowance for any expense in connection with the 44 cases confiscated by the authorities or the 141 cases which were hijacked and never recovered. In the recent case of *Standard Oil Co.*, 43 B. T. A. 973, the question of deductibility of fines and penalties incurred by illegal businesses arose and this Board disallowed any such deductions from gross income on the ground of public policy, citing *Great Northern Railway Co.*, 40 Fed. (2d) 372; certiorari denied, 282 U. S. 855; *Burroughs Building Material Co.*, 47 Fed. (2d) 178; *Chicago R. I. & P. Ry. Co.*, 47 Fed. (2d) 990; certiorari denied, 284 U. S. 618; *Tunnel R. R. of St. Louis*, 61 Fed. (2d) 166, certiorari denied 288 U. S. 604. We can see no distinction between a fine paid to the government for an illegal business act and the confiscation of the taxpayer's goods for the same reason. Having denied a deduction in the former instance, we must likewise deny to Kjar this advantage afforded the honest business man. Had we included in our calculation of gross income the expenses incurred in connection with purchase, shipping, etc., of the 44 confiscated cases, we would, in effect, be affording Kjar

the same relief as those deductions provided by statute in section 23, Revenue Act of 1928. Therefore, we exclude entirely these transactions when determining gross income. In determining gross income it is only the cost of acquisition of the goods sold which is considered. Losses by theft not compensated for by insurance or otherwise are generally permissible deductions pursuant to section 23(e)(3) of the Revenue Acts. To allow such a deduction in the instant case would be contrary to sound reason. The 141 cases which were hijacked were all subject to confiscation by the government because illegally held. As already demonstrated, no relief could be afforded the "bootlegger" in such an instance. Merely because another criminal reaches the liquor before it is confiscated, the conclusion is not altered, for Kjar was never entitled to lawful possession of the liquor. Consequently, a deduction for loss by theft not being permissible, we can not well take into consideration the cost of such liquor and expenses incurred in its handling when calculating gross income.

The other losses claimed by Kjar for 1928, i.e., $500 forfeited bail, $300 "get-away" money, and $300 in connection with the confiscation of 22 cases of rye, are not proper deductions. To allow them would be against public policy. The $300 item paid in connection with the confiscation of the rye is unexplained but presumably a fine, such as we have already fully considered, *supra*.

The charges for the storage of the liquor pending sale and delivery to the customers and the charges for loading into the customers' cars we can not take into consideration in our computation of petitioner's gross income. Such charges are not properly includible in the arithmetical calculation of gross income but are generally allowable deductions from gross income pursuant to statute. Such expenses were not primarily incurred in the purchase and acquisition by Kjar of the liquor, but were necessitated by the illegality of the intended transactions, which called for the greatest secrecy. Such expenditures are not capital expenditures; they are nothing more than business expenses in connection with the sales. Such expenses are both allowable deductions by reason of the provisions of section 23 of the Revenue Act of 1928 in ordinary cases. But, while we are required

to compute gross income in the same manner whether the taxpayers' businesses be legal or illegal; we do not allow the same deductions in computing *taxable net income.* As we have already indicated, *supra,* this is because of well founded policy reasons aimed toward giving rewards (deductions, in this case) to only those who conduct their every day lives and businesses within the confines of the law. Accordingly, we disallow any deductions for amounts paid for storage of liquor or for loading. *Israel Silberman,* 44 B. T. A. 600.

It is impossible to reconcile the testimony of the various witnesses as to Kjar's activities in 1929. At least three of them denied having any knowledge that Kjar was engaged in "bootlegging" at any time during the year. One of these three witnesses was W. Jenkins. R. A. Bailey, the chief witness for the respondent, not only asserted that Kjar was doing business in 1929, but also that W. Jenkins was sharing in some of the boat loads of liquor handled. Obviously, if they were sharing boatloads, Jenkins would have known of Kjar's activities and, consequently, if Jenkins was telling the truth, Bailey was not, and vice versa. R. Cannon, an employee of Bailey's in Savannah, testified positively that Kjar was not "running" liquor in 1929 in the months of January to June. H. C. Bookhoop who was in his teens at the time, testified that he met Kjar in 1929 in Florence, S. C., while he (Bookhoop) was helping his father unload and store liquor. He said that he worked for Kjar and got 50 cents a case for storage and that he unloaded the "Mary" and "The Tanner" three or four times at most, but he didn't think "The Tanner" came in until 1930 or 1931, though it could have been 1929. But "The Tanner" was not built until 1930. Bookhoop's brother, who also testified, merely said that he might have met Kjar in 1929. The petitioner, himself, testified that he left Savannah in the fall of the year; that he stopped only overnight at Florence; and, although he was around that vicinity, he did not engage in the liquor business at all in 1929. He also testified that Sanchez had shared an interest in the liquor that came in at Savannah in the prior year and often repreented him in transactions in 1928 but that Sanchez did not represent him in any dealing in South Carolina. Bailey, the witness for the respondent, testified

to certain facts diametrically opposite to those to which Kjar had testified. For example, he said that Kjar and his wife lived at the same apartment house which he himself lived in at Florence. He also said that Edgar Sanchez was working as agent for Kjar in 1929, though, when asked how he knew this, he said that he merely assumed it because it had been so in Savannah in the prior year. He definitely stated that Kjar came in from Bermuda once on "The Dorothy," a two-masted vessel, which ran aground but was unloaded and that a second trip was made but was confiscated. Kjar was picked up on suspicion in the neighborhood of Florence, but later released. This fact was admitted by Kjar. Bailey testified he bought the entire first load from Kjar when it came in, and distributed it himself. At various points in his testimony he asserted that Kjar had in 1929 brought in "more than 6 loads," more than 6 loads for 1929 and 1930, combined, about 12 loads for the combined years, and about 20 loads for the 2 years. As his testimony continued, his estimate of Kjar's interest in liquor grew larger and larger; but he admitted that a great many of these loads were brought in by Sanchez, not Kjar, and that most of them must have been in 1930, for he didn't know the number of Kjar's loads in 1929.

Looking at this mass of jumbled testimony in the most plausible light, we have arrived at the conclusion set forth in our Findings of Fact. Since, we have found that Kjar realized no gain on the load turned over to Bailey and that, if a second load was brought in in 1929, it was confiscated, we reach the inevitable conclusion that Kjar received no taxable income in 1929.

In arriving at our determination of Kjar's gross income for 1930, we were again faced with conflicting testimony. Both Bookhoop brothers testified that they did some unloading for Kjar from "The Tanner," three, four or five times and also unloaded some barges for him late in the year. One of the brothers asserted definitely that he had seen Kjar in the fall of the year at Florence. Another witness, J. C. Hall, testified that he started buying liquor from the bootleggers in Savannah just before Christmas in 1930 but never had any dealings with Kjar, though he did have with Sanchez. The respondent introduced six alleged invoices which

Bailey, the respondent's witness, identified as representing loads in which Kjar had an interest. Five of the six alleged invoices were for 1930, the sixth for 1929. As we have already pointed out in connection with Kjar's 1929 activities, Bailey's estimate of the number of loads in 1929 and 1930, combined, in which Kjar had an interest, varied from 6 to 20. But it is most significant that Bailey admitted that whatever the amount, he was including loads received by Sanchez after Kjar went to Canada. Sometime in the fall of 1930, Bailey went to the Atlanta Penitentiary, where he served a two year sentence.

Kjar admits that he did some business in 1930 but denies that Sanchez was his agent at any time during the year, and it is significant to note that Sanchez stipulated with government counsel that he (Sanchez) owed the same taxes and penalties which the Commissioner has also asserted against Kjar for 1930. This fact lends strong support to Kjar's contention that Sanchez was in business for himself in 1930 and was not representing Kjar.

In arriving at the conclusion that Kjar sold 750 cases of liquor, purchased at $14.50 per case, in 1930 for approximately $32 per case, we discounted the testimony of Bailey for two reasons; first, his inconsistencies, and, second, because his testimony was based upon the assumption that Sanchez was acting as Kjar's agent whereas we concluded that he was not. Having discarded this testimony of Bailey's, we were left with the testimony of the Bookhoop brothers and Kjar himself. The Bookhoops both testified that they unloaded four cargoes for Kjar from "The Tanner" in the winter of 1930. While Kjar denied ever having had an interest in any cargoes on "The Tanner," it is possible that the Bookhoops are wrong about the name of the boat but not likely that they should both be wrong about the number of the loads inasmuch as their father was being paid for the unloading and storage and loading into the automobiles. The charges per case for these three services, according to the testimony of the Bookhoops was 50 cents for each service. The freight charge remained $5 per case. We have concluded that Kjar had an interest during this taxable year in 750 cases which he sold at $32 a case. The direct expenses connected with the purchase and acquisition

of the 750 cases was $20 per case, making Kjar's taxable income $12 per case, or a total of $9,000. No deduction is allowable for any of the losses for reasons already outlined, nor is deduction allowable for expenses of storage and loading liquor into customers' cars, the charges for which were 50 cents per case.

We have concluded that Kjar's sole taxable income for 1931 was the $3,000 earned in 1930. The sole witnesses, other than petitioner, with reference to this year were the Bookhoop brothers. H. C. Bookhoop testified that Kjar had ceased bringing liquor in in 1931. D. Bookhoop said that Edgar Sanchez was still handling liquor. Both brothers told of a raid on their barn where the liquor was stored but, whereas H. C. Bookhoop said that the liquor all belonged to Wilson Jenkins, his brother testified that it belonged to Kjar and Sanchez. But the brother said that he never saw Kjar around, only Sanchez. The testimony of these brothers is very conflicting, but points toward Kjar's contention that he was not in the vicinity and that any liquor brought in by Sanchez was for himself.

The testimony relative to petitioner's activities in 1932 was given by Kjar and two other witnesses. One of these witnesses, J. C. Hall, testified that he met Kjar for the first time in 1932 in New Jersey while on his summer vacation and knew nothing about any bootlegging activities. The other witness testified to various activities of Sanchez during 1932 but said that he neither saw Kjar nor heard his name mentioned. This was a man whom Sanchez contacted for storing and landing his liquor. Both were government witnesses. Kjar's testimony was uncontradicted; and we, therefore, consider the presumption in favor of the correctness of respondent's determination overcome. Kjar's sole income was $1,400 received as commission on the sale of a ship in California. His wife received, in addition, $1,800 in dividends which she reported individually.

The second issue before us is whether Kjar's failure to report his income was predicated upon fraud. Since we have determined that there are no deficiencies for the years 1929, 1931 and 1932, as to those years there can be no fraud penalty; but, since we have determined deficiencies for 1928 and 1930, Kjar is liable for a 50 percent penalty if fraud

is proven. The respondent, having asserted fraud, must bear the burden of proving it by clear and convincing evidence. *Frank A. Maddas,* 40 B. T. A. 572. As to 1928, we believe that Kjar honestly thought he was entitled to offset all expenses and losses against his gross income. However, even figuring taxable income in this manner, there was well over $10,000 in net income, of which Kjar made no report. Considering the size of this amount, the general circumstances surrounding petitioner, including his frugal way of living, and the illegal nature of the business in which he had been engaged for years, we can not, with any sense of reality, conclude that his failure to return this amount for taxation was due solely to mistake or carelessness. The evidence submitted at the hearing clearly indicates that the figures Kjar has given us with regard to his receipts are incorrect. Mere doubt has been held to be insufficient to establish fraud, *Arthur M. Godwin,* 34 B. T. A. 485, but in the instant case there seems to be no room for doubt that Kjar knew the amount of his purchases and sales in 1928; and with such knowledge, nevertheless failed to report any taxable income for the year. This failure to file a return of income for 1928 in an amount in excess of any exemptions and deductions to which Kjar might reasonably have believed himself entitled, was due to fraud and a 50 percent penalty therefor is proper. See *Alexander Davidson,* 43 B. T. A. 342, 347. As to 1930 we have again found that Kjar had interests in liquor in excess of the amount stated by him. On precisely the same ground as we stated in connection with the 1928 fraud issue, we find that Kjar's failure to report income for 1930 was predicated upon fraud. The 50 percent penalty is therefore correct as to these two years.

The third issue involved pertains to the 25 percent penalty for failure to file returns of taxable income. This 25 percent penalty is required for the years 1928 and 1930. *Scranton, Lackawanna Trust Co., Trustee,* 29 B. T. A. 698; affirmed 80 Fed. (2d) 519; certiorari denied 297 U. S. 723; *Edmonds* v. *Commissioner,* 90 Fed. (2d) 14, certiorari denied 302 U. S. 713; *Sabatini* v. *Commissioner,* 98 Fed. (2d) 753; *National Contracting Co.,* 37 B. T. A. 689 *105* Fed. (2d) *488; Nicholas Roerich,* 38 B. T. A. 567.

The sole remaining issue relates to the asserted transferee liability of Ester Harley Sharon and Mary Sanchez. As indicated in our Findings of Fact, *supra*, Ester Harley Sharon received, without paying adequate consideration therefor, certain realty in Minami, Florida from Andrew Kjar. As to this property, she is liable as a transferee provided the assets of Andrew Kjar do not provide sufficient cash to pay the deficiencies ascertained by Rule 50 proceedings to be owing. With regard to the property known as the Winn Plantation the evidence is confusing and leaves the whole transaction somewhat of a mystery. Respondent has the burden of proving a transfer of property by the taxpayer in order to establish liability of the tarnsferee. See section 602, Revenue Act of 1928; *E. M. Hurlbut, Transferee,* 33 B. T. A. 868. There is not sufficient evidence for us to conclude that the conveyance by Hearne to Mrs. Sharon was a means whereby the taxpayer made a transfer of any of his property to his daughter. Therefore, as to this property we conclude that Mrs. Sharon has no transferee liability.

Mary Sanchez has admitted transferee liability on her part. It appears from the evidence presented at the hearing that certain jeopardy assessments have already been made against the properties of Andrew Kjar, Katherine Kjar and Ester Harley Sharon. Should it develop at the Rule 50 hearing that the assets of Andrew Kjar already seized are sufficient to satisfy the deficiencies and penalties, then an adjustment will be made with regard to the liability asserted against Ester Harley Sharon under the jeopardy assessments. As previously stated, Katherine D. Kjar is not liable for deficiencies arising out of failure of her husband to report income. No transferee proceeding has been brought against her and therefore the jeopardy assessments against her property are unjustified.

Entered Sep. 30, 1941.

Decision will be entered under Rule 50.

INDEX

CITATIONS

759890—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 232

ANREW KJAR, ALIAS PETER ORLOFF, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the court below (R. 28–32) is reported in 69 F. Supp. 406. The opinion on motion for a new trial (R. 33–36) is not yet reported.

JURISDICTION

The judgment of the court below in favor of the United States on its counterclaim, in the amount of $100,685.11, plus interest, was entered February 3, 1947. (R. 28.) On March 3, 1947,

the plaintiff below[1] filed a motion for a new trial. On May 5, 1947, the motion was allowed in part and overruled in part and judgment was entered for plaintiff, Katherine D. Kjar, in the amount of $6,000, and judgment was entered for the Government on its counterclaim against Andrew Kjar in the amount of $106,685.11, plus interest. (R. 36–37.) This petition for a writ of certiorari was filed July 30, 1947. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Where the Board of Tax Appeals (now the Tax Court), for the purpose of determining the income tax liability of petitioner, made a finding of fact as to the quantity of distilled spirits illegally imported into the United States by him during the period involved, is such finding binding upon the Court of Claims in a subsequent proceeding involving distilled spirits taxes upon the importations?

STATEMENT

The special findings of fact of the Court of Claims (R. 14–28) may be summarized as follows:

During the period involved, the petitioner was

[1] The suit below was instituted by Andrew Kjar, petitioner herein, Katherine D. Kjar, nee Orloff, and Ester Harley Sharon, severally and jointly.

engaged in the illicit importation and sale of distilled spirits (R. 14–15) and failed to file returns for either income or distilled spirits tax purposes. The Commissioner of Internal Revenue made jeopardy assessments against petitioner for income tax deficiencies and penalties for the years 1928 to 1932, inclusive, and upon his failure to satisfy such assessments, his properties were seized and sold by the Collector of Internal Revenue pursuant to the relevant provisions of the Revised Statutes. (R. 15, 18–26.)

The Commissioner of Internal Revenue also assessed distilled spirits taxes against petitioner and other individuals associated with him in his illegal operations, and those assessments were outstanding and unsatisfied at the time the instant suit was filed in the Court of Claims. (R. 16–17.)

Petitioner appealed to the Board of Tax Appeals (now the Tax Court, and hereinafter sometimes referred to as the Board) from the Commissioner's determination of his income tax liability, and the Board determined that the taxes of Kjar and his wife, Katherine D. Kjar, had been overpaid for the period involved, in the total amount of $16,025.59.[2] *Kjar* v. *Commissioner,* 1941 P–H B. T. A. Memorandum Decisions, par. 41,446. Incidental to this determination, the

[2] Petitioner actually paid no taxes and the overpayment found by the Board resulted from the application to the assessments of the proceeds of the sales of his property.

Board found that during the year 1928 petitioner had imported 2,566 cases of distilled spirits, and that during the year 1930, he had imported 750 cases (aggregating 9,948 gallons), and that for the years 1929, 1931 and 1932 he had not engaged in the liquor business. (R. 17.)

Checks aggregating the amount found by the Board to be owing by the Commissioner were issued by the disbursing officer in favor of Andrew Kjar and his wife, Katherine D. Kjar, and were transmitted to the Collector of Internal Revenue for appropriate action. In view of the fact that the Collector had outstanding on his records against petitioner large amounts of distilled spirits taxes, a deputy collector presented the checks to petitioner and his wife with the request that they be suitably endorsed in order that the amounts thereof might be applied in partial satisfaction of the distilled spirits taxes. Petitioner and his wife refused to so endorse the checks and the deputy collector then requested Katherine D. Kjar to show what portion of the refund was due to her personally, but since she was unable to do so, the checks were returned to the Commissioner of Internal Revenue at Washington, D. C. (R. 17–18.)

Petitioner brought this suit in the Court of Claims to recover the properties seized and sold by the Collector, or the monetary equivalent thereof, together with the amount of overpayment of

income taxes found by the Board of Tax Appeals, and certain alleged damages. (R. 2, 3.) Respondent answered petitioner's petition in the Court of Claims by a special answer and counterclaim praying the dismissal of the petition and a judgment over in favor of respondent in amount of $100,685.11, which represented the outstanding distilled spirits tax assessments as reduced by the overpayment of income taxes found by the Board in favor of petitioner and his wife. (R. 4–5.)

The evidence adduced at the trial established that petitioner had sold the distilled spirits which he smuggled into the United States for beverage purposes and that no distilled spirits taxes or customs duties had been paid on such distilled spirits. (R. 14–15.) Therefore, the respondent amended its special answer and counterclaim praying judgment against the petitioner in amount of $1,217,854.01, which represented the beverage rate on the quantity of distilled spirits determined by the Commissioner of Internal Revenue to have been imported, together with the customs duties thereon.[3] (R. 7–9.)

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[3] In his assessments of distilled spirits taxes, the Commissioner of Internal Revenue applied the basic or production rate of $1.10 per gallon prescribed by subdivision (3) of Section 600 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, as amended by Section 900 of the Revenue Act of 1926, c. 27, 44 Stat. 9, whereas respondent's counterclaim sought judgment against petitioner at the rate of $6.40 per gallon as prescribed by subdivision (4) of Section 600, as amended, for distilled spirits diverted to beverage purposes.

The Commissioner of Internal Revenue in making his distilled spirits tax assessments against petitioner and other individuals associated with him in his smuggling operations determined that from June 1928 to January 1932 petitioner had illegally imported and diverted to beverage purposes 108,463 gallons of distilled spirits.[4] The amount of distilled spirits taxes originally assessed by the Commissioner of Internal Revenue was $119,309.30, but as one of the assessments was later reduced by the amount of $2,598.60 by the acceptance of an offer in compromise made by one of the taxpayers, the amount of taxes outstanding at the time this suit was instituted was $116,710.70. (R. 16.)

ARGUMENT

The Court of Claims determined from the evidence that the petitioner had completely failed to prove the amount of the distilled spirits which he illegally imported into the United States during the years involved, and that, therefore, the presumptive correctness of the determination of the Commissioner of Internal Revenue had not been rebutted. (R. 30.) The only issue which the petitioner seeks to have reviewed in this Court is whether the Court of Claims was estopped by the decision of the Board of Tax Appeals to determine that a greater quantity of distilled spirits

[4] The record at page 16, showing that the assessment of April 1939 was made on 27,318 gallons, is incorrect. The correct gallonage is 37,318. (R. 5, 8.)

had been imported by petitioner than that found by the Board.

The petitioner starts from the faulty premise that the identical distilled spirits tax assessments involved in the instant proceeding were at issue before the Board of Tax Appeals. (Pet. 15.) But the sole question before the Board was the correct income tax liability of petitioner for the years involved. In this determination, the Board was concerned merely with the selling price of the whiskey acquired by petitioner and the cost of such whiskey to him. Neither the source of the acquisition nor the disposition of the liquor was pertinent to the inquiry. It was immaterial whether the distilled spirits had been illegally imported or whether they had been diverted to beverage purposes. In the instant suit, however, for the purpose of determining the correct amount of judgment on respondent's counterclaim, it was necessary for the Court of Claims to inquire into the question of whether the distilled spirits had been illegally imported into the United States and whether such spirits had been diverted to beverage purposes. Since the finding by the Board of Tax Appeals, that the distilled spirits involved were illegally imported into the United States by the petitioner, was not essential to its determination, the Court of Claims was not estopped by the finding of the Board to determine the correct quantity of distilled spirits smuggled into the United States.

The applicability of the doctrine of estoppel by judgment is well settled. In a different cause of action between the same parties, the doctrine applies only as to those matters which were distinctly in issue as a ground of recovery in the former proceeding. *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623; *United States* v. *Moser*, 266 U. S. 236, 241; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353. The rule is succinctly stated in *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48:

> The general principle announced in numerous cases that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

See also *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Myers* v. *International Trust Co.*, 263 U. S. 64.

The petitioner apparently is endeavoring to apply the doctrine of *res judicata*, under which every admissible matter offered to sustain or defeat the prior claim or demand is barred from litigation between the parties or their privies upon any ground whatsoever. But that doctrine

has no application here, *Cromwell* v. *County of Sac, supra,* since the issue in this proceeding has *not* been adjudicated before, by the Board or any other tribunal. The petitioner seems to have overlooked the difference in character between the income tax assessments involved in the proceeding before the Board of Tax Appeals and those involved in the instant suit. The income tax assessments before the Board were made only against petitioner and his wife, and their income tax liability was the sole issue. But a different situation exists as to the distilled spirits tax assessments. The petitioner, in his illicit operations, was associated with certain other persons, each of whom owned a portion of the distilled spirits smuggled into the United States. In the income tax case, petitioner obviously was liable for taxes only on the profits which accrued to him on his portion of the shipments. However, this was not true as to the distilled spirits taxes. Those assessments covered the aggregate quantity of distilled spirits illegally imported into the United States by the entire group and the assessments were made against all parties involved jointly and severally. Therefore, the total amount of such assessments could be collected from one or more of the taxpayers against whom the assessments were made. It is apparent, therefore, that the Court of Claims, which had for consideration only the validity of the distilled spirits tax assessments, was at liberty to disregard the finding by the Board of Tax Ap-

peals in the income tax case and determine that petitioner was liable for distilled spirits taxes on a larger quantity than that found by the Board of Tax Appeals.

When the instant suit was filed, the distilled spirits tax assessments were outstanding against the petitioner and he failed to prove that such assessments were incorrect or otherwise invalid. Therefore, the Court of Claims had no alternative but to render judgment thereon.

CONCLUSION

The petition for certiorari presents no question warranting review and should be denied.[5]

Respectfully submitted.

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SEPTEMBER 1947.

[5] The court below rendered judgment on respondent's counterclaim at the basic or production rate of $1.10 per gallon on the gallonage of distilled spirits determined by the Commissioner of Internal Revenue to have been imported. The respondent contended that in view of the evidence, the beverage rate of $6.40 should have been used and that in addition, judgment should have been entered against the petitioner for the customs duties imposed upon imported distilled spirits of $5 per gallon. In the event the petition for a writ of certiorari is granted, the respondent expects to renew those contentions in this Court, for purposes of sustaining the judgment below.

U. S. GOVERNMENT PRINTING OFFICE: 1947